PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CROWN CASTLE FIBER LLC, *Complainant*, v. COMMONWEALTH EDISON COMPANY, *Respondent*.	Proceeding Number 19-170 Bureau ID Number EB-19-MD-005

REPLY TO RESPONDENT'S ANSWER TO COMPLAINANT'S POLE ATTACHMENT COMPLAINT – UNLAWFUL RATES

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SUMMARY

As Crown Castle Fiber LLC ("Crown Castle") established in its Complaint, Commonwealth Edison Company ("ComEd") has charged Crown Castle pole attachment rates for both wireless and wireline attachments that far exceed the maximum lawful rates permitted by the Commission's pole attachment formula. While ComEd denies that the pole attachment rates it charged Crown Castle – in excess of $[redacted] per pole for wireless – were excessive, it concedes that the rates were not calculated in accordance with the Commission's pole attachment rules.

In support of its excessive rates, ComEd claims that Crown Castle's wireless node attachments are not governed by Section 224. ComEd's argument is incorrect because the federal definition of "pole attachment" does not distinguish between wireless and wireline attachments. Moreover, ComEd's argument that Crown Castle must, itself, provide wireless service using the antennas is also incorrect. The Act governs "any" pole attachment by a telecommunications provider, and the Commission has repeatedly held that Section 224 applies to all of an attacher's equipment. Ultimately, Crown Castle's antennas are integral to its provision of its transport service to wireless carriers via its small cell networks. Simply put, as the Commission has repeatedly recognized and the Supreme Court confirmed, the Commission's pole attachment rate formula applies to wireless attachments.

Not only has ComEd charged excessive per pole rates for the last 6 years, it also refuses to charge proportionately less for poles it owns jointly with AT&T (which also charges Crown Castle rent for the same poles), relying solely upon the fact that its pole attachment agreements with Crown Castle do not differentiate between solely and jointly owned poles. Not only does ComEd's position ignore the Commission's sign and sue rule – as well as clear precedent

concerning joint use poles – ComEd then uses these same rules to its benefit in calculating its per pole rents by reducing its pole count to reflect its shared ownership, resulting in higher rates. And ComEd's duplicity does not stop there.

ComEd's arguments regarding the space occupied by wireless attachments is not credible. ComEd incredibly claims that it should be entitled to assess Crown Castle's wireless nodes for as much as 35 feet of space on a 40 foot pole even though ComEd co-occupies all poles to which Crown Castle is attached, as do other communications attachers. And, in doing so, it relies solely upon the diagrams submitted by Crown Castle in its Complaint. In fact, those diagrams conclusively demonstrate that Crown Castle's wireless node attachments do not occupy more than 6 feet of *usable* space on ComEd's poles, and ComEd offers no evidence to the contrary. The Commission has long held that pole owners may not charge for ancillary equipment in the unusable space; ComEd simply ignores the well-established precedent.

ComEd also refuses to acknowledge that in transferring excess accumulated deferred income taxes ("ADIT") resulting from the Tax Cut and Jobs Act into an account not currently captured in the pole attachment rate formula, ComEd would unfairly charge attachers a return on cost-free capital. Without any support for its argument, ComEd asks the Commission to disregard directly relevant cases from Ohio and Connecticut, where the pole owners, the attachers, and the regulatory authorities devised an elegant accounting adjustment to rectify this unique circumstance. In fact, the Commission directs utilities to follow state practices in removing accumulated deferred taxes from the electric rate base, something the Illinois Commerce Commission has long required of ComEd. Moreover, contrary to ComEd's assertions, a rulemaking is not required to make this adjustment. The Commission has, in adjudicatory proceedings, permitted modification to FERC accounts used in the federal pole

attachment formula for unique circumstances where doing so is necessary to ensure just and reasonable rates.

Finally, based on ComEd's responses to certain of Crown Castle's interrogatories, it appears that ComEd's use of the Commission's pole height presumption of 37.5 feet and its 15% appurtenance presumption are not appropriate in this case. Based upon the data provided by ComEd for 2017 and 2018, its average pole height is at least [redacted] feet, and its appurtenances comprise approximately [redacted]% of its Account 364. Accordingly, these values should be used in the pole attachment rate calculations. There is also a question as to whether the nearly $[redacted] paid by Crown Castle to ComEd for pole replacements are included in ComEd's account 364. If so, such amounts must be removed from the rate base per the Commission's rules.

Finally, ComEd's affirmative defenses are unavailing. The Bureau has correctly rejected ComEd's claim that the Illinois Commerce Commission ("ICC") has jurisdiction. ComEd's argument that Crown Castle is not a telecommunications provider is contradicted by Crown Castle's certificate of authority from the ICC and the clear facts. There is no good faith basis for ComEd's challenge. ComEd's argument that Crown Castle's antenna attachments are "unregulated" is contradicted by the broad definition of a pole attachment, which includes "any" attachment by a telecommunications provider. There is no requirement that Crown Castle provide wireless service itself, and the Commission has rejected similar claims. Ultimately, the antennas are an integral part of Crown Castle's telecommunications service and protected by Section 224.

ComEd's arguments about corporate identity are also meritless. There has never been a transaction that triggered the transfer and consent provisions of the pole attachment agreements, and Crown Castle is the proper party under the agreements.

ComEd's attempt to avoid liability for its violations by arguing that relief should only be prospective are groundless. The ICC has never had jurisdiction over Crown Castle's attachments to ComEd's poles. There is no "retroactive" rulemaking. ComEd's argument is essentially that it thought it was free from any regulatory limits. That is obviously inaccurate. The Commission's rules on these issues are well-established and clear. ComEd's parent company even filed a petition for reconsideration of the Commission's One Touch Make-Ready Order, naming ComEd as one of its operating subsidiaries and specifically attacking the red tag issue, among others. ComEd cannot claim it had no warning that its actions were unjust and unreasonable and in violation of law.

Accordingly, ComEd has failed to rebut Crown Castle's claims, and the Commission should grant Crown Castle the relief requested.

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I. INTRODUCTION

Crown Castle Fiber LLC ("Crown Castle"), by and through undersigned counsel, and pursuant to 47 C.F.R. § 1.728, replies to Respondent Commonwealth Edison Company's ("ComEd") Answer to Crown Castle's Pole Attachment Complaint – Unlawful Rates in the above-referenced docket. Rather than engage in a repetitive paragraph-by-paragraph reply to ComEd's paragraph-by-paragraph Answer, Crown Castle addresses issues raised in its Complaint and ComEd's Answer by topic, with references to the appropriate Complaint/Answer paragraphs at issue.

REPLY TO ANSWER

II. THE COMMISSION'S TELECOMMUNICATIONS FORMULA APPLIES TO CROWN CASTLE'S WIRELESS NODE ATTACHMENTS

Crown Castle's wireless node attachments are subject to the Commission's telecommunications rate formula. Crown Castle, without question, is a provider of "telecommunications service" under the Communications Act of 1934.[1] The Act defines the term "pole attachment" as "*any* attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."[2] As the Commission recognized in 1998, "the use of the word 'any' precludes a position that Congress intended to distinguish between wire and wireless attachments."[3] Indeed, Rule

[1] 47 U.S.C. § 153(53) ("The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.").

[2] 47 U.S.C. § 224(a).

[3] *Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket No. 97-15, 113 FCC Rcd. 6777, ¶¶ 39-42 (1998).

1.1406(d), which explains the Commission's telecommunications formula, is consistent with Congress's intent and does not differentiate between the two types of telecommunications attachments.[4] Simply put, the same formula applies to wireless and wireline attachments of telecommunications service. To the extent that wireless attachments occupy more space on pole, they are required to pay a multiple of the per foot rate.

ComEd argues that the Commission's telecommunications formula does not apply to Crown Castle's wireless node attachments because "[t]he 2011 Order granted wireless attachments by wireless carriers rights to the telecom rate formula, not wireless attachments by entities like Crown Castle that are not wireless carriers."[5] This assertion lacks merit. Whether Crown Castle is a wireline or wireless carrier and whether an attachment is wireless or wireline in nature is irrelevant. The Communication's formula applies to all types of attachments made by all types of telecommunications providers. As Crown Castle asserted in its Complaint, and discussed above, the fact that some of Crown Castle's equipment is "wireless" in nature does not change Crown Castle's rights under Section 224 or the Commission's Rules.[6]

ComEd is also incorrect in asserting that the Commission "granted" wireless attachments the right to the telecommunications formula in 2011.[7] The Commission has repeatedly recognized that the telecommunications formula applies to wireless attachments since **1998**.[8] In

[4] 47 C.F.R. § 1.1406(d).

[5] Answer pp. 59-60.

[6] Complaint ¶ 74.

[7] Answer p. 47 ("The 2011 Order granted wireless attachments by wireless carriers' rights to the telecom rate formula, not wireless attachments by entities like Crown Castle that are not wireless carriers.").

[8] *Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket No. 97-15, 113 FCC Rcd. 6777, ¶¶ 39-42 (1998); *see also Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications*

2002, the Supreme Court of the United States affirmed the Commission's conclusion that companies providing service via wireless equipment are still providers of telecommunications services and thus entitled to pole access on regulated rates, terms, and conditions pursuant to Section 224.[9] In its 2011 Order, the Commission **confirmed (not granted)**, among other things, that that "wireless attachments are entitled to the telecom rate formula."[10]

III. COMED MAY NOT CHARGE RATES THAT EXCEED ITS OWNERSHIP PERCENTAGE IN THE POLE

ComEd's rates for wireline and wireless attachments to poles jointly owned with AT&T must reflect ComEd's ownership percentage of said jointly owned poles. ComEd argues that Crown Castle's pole attachment agreements do not "differentiate between rates for solely-owned poles and rates for jointly-owned poles, and so there was no reason for ComEd to charge different rates under this agreement[s]."[11] ComEd also "denies that pole equivalents factor into the rate" because Crown Castle's three pole attachment agreements with ComEd "specify the rates to be charged."[12]

The fact that the pole attachment agreements "specify the rates to be charged" and do not "differentiate between rates for solely-owned poles and rates for jointly-owned poles" is extraneous. Under the Commission's "sign and sue" rule, an attacher may file a complaint

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Providers with Access to Utility Poles at Reasonable Rates, Public Notice, 19 FCC Rcd 24930 (WTB 2004).

[9] *National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 341-42 (2002).

[10] *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240, ¶¶ 74-77, 153 (Apr. 7, 2011) ("2011 Order").

[11] Answer at pp. 45, 47, 49, 50, 55.

[12] Answer at pp. 45, 47, 49, 50, 55.

challenging the lawfulness of a provision after the execution of an agreement.[13] Charging 100% of a pole rate for attachments to poles that are jointly owned is indisputably unjust and unreasonable. In 2002, the Commission confirmed that pole attachment rates should reflect pole count equivalents:

> If a utility owns 20 poles and 50 percent of 20 additional poles, its equivalent pole count is 30. Assuming its total net pole investment and carrying charges are $300.00, the per pole rate is $10.00. If it collects for an attachment on every pole, it will collect 20 x $10.00 and 20 x $5.00 = $300.00 for a full recovery.[14]

Moreover, ComEd clearly recognizes that pole rates for attachments to jointly owned poles should reflect its ownership percentage of a pole. For wireline attachments made pursuant to the Crown Castle Pole Attachment Agreement, ComEd charged Crown Castle a reduced wireline rate (approximately [redacted]% of the full rate) for attachments to poles jointly owned with AT&T, even though the Crown Castle Agreement does not distinguish between jointly and solely owned poles:[15]

Year	Fiber Rate *Sole*	Fiber Rate *Joint*
2013	$[redacted]	[redacted]
2014	$[redacted]	[redacted]

[13] *Verizon Virginia, LLC & Verizon S., Inc., v. Virginia Electric and Power Company*, Order, Proceeding No. 15-190, 32 FCC Rcd. 3750, ¶23-24 (2017); *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*. Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11905. ¶ 99 (2010); *Southern Co. Servs, v. FCC*, 313 F.3d 574. 578 (D.C. Cir. 2002) (under the "sign and sue" rule, "an attacher may 'sign' a contract with a utility and later file a com-plaint with the FCC to contest an element of that agreement deemed to be unfair").

[14] *Nevada State Cable Television Ass'n*, Order on Reconsideration, 17 F.C.C. Rcd. 15534, ¶5 n. 17 (Aug 8, 2002).

[15] Complaint ¶ 45, Attachment B, CCF216 – 221, CCF CCF248. Crown Castle notes that it does not concede that 54% reflects ComEd's ownership percentage of poles that it jointly owns with ComEd.

2015		[redacted]			[redacted]	
2016		[redacted]			[redacted]	
2017		[redacted]			[redacted]	
2018		[redacted]			[redacted]	

And, in calculating its rates in this proceeding, ComEd uses a pole count that is reduced to reflect its partial ownership, resulting in higher rates. Therefore, ComEd should refund Crown Castle for charging rates that (1) exceed the maximum pole attachment rate permitted and (2) that do not reflect percentage of ownership of a pole.

IV. CROWN CASTLE'S POLE ATTACHMENT RATES WERE CALCULATED IN ACCORDANCE WITH THE COMMISSION'S TELECOMMUNICATIONS RATE FORMULA

A. The Pole Attachment Rate Calculations Provided in Crown Castle's Pole Attachment Complaint Reflect the Maximum Lawful Rates Permitted Under the Commission's Rules

In its Answer, ComEd admits that it has not been calculating its rates in accordance with the FCC formula and provides revised calculations attached to its answer as Attachment F, Exhibit 2. ComEd also "denies that Crown Castle's calculation of ComEd's pole attachment rates accurately reflect rates generated consistent with the FCC's formula. Instead, ComEd believes the calculations appended to its Answer as Attachment F, Exhibit 2 reflect the proper calculation."[16] Notably, ComEd's calculations produce rates that are only pennies less than the rates included in Crown Castle's Pole Attachment Complaint. The following chart demonstrates the telecommunications rate for attachments in urbanized service areas that Crown Castle and ComEd calculated:

	2012	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**
Crown Castle Calculation	$[redacted]						
ComEd Calculation	$[redacted]						
Difference	$[redacted]						

[16] Answer pp. 34, 35, 36, 38, 42, 44, 45, 46, 47, 49, 54.

The discrepancies between the rates calculated in Attachment G of Crown Castle's Pole Attachment Complaint and Attachment F, Exhibit 2 of ComEd's Answer are attributable to two factors. First, ComEd uses a different pole count equivalent for each year from 2013 to 2018. Crown Castle only had a pole count equivalent for the year-end 2017, which is why Interrogatories 4, 5, and 6 of Crown Castle's First Set of Interrogatories request this information for each year from 2012 to 2018. Indeed, Crown Castle explicitly stated in its Complaint that the utilized pole count equivalent is "subject to confirmation through discovery and further vetting throughout this proceeding."[17]

Second, Crown Castle and ComEd prorated the Depreciation Reserve for poles using different plant levels:

- **Crown Castle**: Gross Pole Investment/Gross Investment in *Electric* Plant x *Electric* Plant Accumulated Deprecation
- **ComEd**: Gross Pole Investment/Gross Investment in *Distribution* Plant x *Distribution* Plant Accumulated Deprecation

Either methodology for prorating Depreciation Reserve for poles is acceptable under the Commission's rules.[18]

Notably, neither Crown Castle's nor ComEd's rate calculations include the necessary adjustment for excess accumulated deferred income tax ("ADIT") which requires additional information requested from ComEd. As of this date, however, ComEd has refused to provide this information.

[17] Crown Castle's First Set of Interrogatories; Complaint ¶ 35.

[18] *RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Co.*, Phase I Order, 17 FCC Rcd. 25238, ¶8 (Dec. 17, 2002).

B. Crown Castle's Wireless Node Attachments Do Not Occupy More Than 6 Feet of Usable Space on ComEd's Poles

As demonstrated in Paragraphs 62 through 69 and Attachment B, Exhibit 1 of the Complaint (CCF123 to CCF205), none of Crown Castle's wireless node attachments occupy more than 6 feet of *usable* space on ComEd's poles.[19] ComEd's challenge to this assumption is meritless and so incredible that it demonstrates a lack of good faith on ComEd's part.

The diagram on bates pages CCF143-CCF144 illustrates that the ***largest*** of Crown Castle's wireless configurations attach facilities in the usable space that include (1) a pole extension mount that occupies 26 inches the power space[20] and (2) a small cell site solution shroud (with bolts) that occupies 37.4 inches on the pole.[21] Collectively, this equipment occupies 63.4 inches on the pole, which equates to **5.28** feet of space.

Incredibly, ComEd contends that Crown Castle's facilities illustrated in CCF143 occupy "a total of approximately 35 feet," which almost equates to the entire height of the pole (40 feet).[22] Under this rationale, ComEd could charge Crown for 87.5% of cost of the pole regardless of whether other attachers also pay pole attachment rent to ComEd for the same poles, and despite the fact that ComEd facilities (including conductors, transformers and other equipment) are located the same poles. Moreover, ComEd's occupied space estimate of 35 feet includes equipment that is either (a) ancillary, (b) in the unusable space or (c) located off the pole.[23] The Commission has held that ancillary equipment should be excluded in calculating the

[19] Complaint ¶¶ 62-69.

[20] Complaint, Attachment B, Ex. 1, CCF144.

[21] Complaint, Attachment B, Ex. 1, CCF144.

[22] Answer pp. 51-52; Complaint, Attachment B, Exhibit 1, CCF144.

[23] Answer pp. 51-52 citing the following equipment not in the useable space:

- antenna (off the pole above the pole) (Label A)

usable space occupied by an attachment.[24] Therefore, total space occupied should only include facilities that are attached within the *usable* space. Antennas that are above the pole are likewise not occupying any usable space. Only the bracket that mounts to the pole is occupying usable space.

In fact, if ComEd believes that Crown Castle should be charged for 35 feet of usable space, it is essentially conceding that 35 feet of the pole, not 13.5, is *usable*. If that is the case, then the percentage of space occupied by a single foot on every 40 foot pole would be 1/35 or 2.85%, instead of the 7.4% allocator derived using the FCC's presumptions (other joint use poles would be similarly impacted). This allocator would necessarily be applied to all attachers on all poles and would decrease pole rents substantially for all attachers.

The diagram in CCF124-CCF125 illustrates that Crown Castle's attachments in the usable space include (1) a pole top extension that occupies 17.75 inches[25] and (2) an antenna kit occupies 24 inches.[26] Together, this equipment occupies 41.75 inches of space, or 3.48 feet of space. ComEd contends that Crown Castle's facilities illustrated in CCF124 add "up to far more than 3.48 feet."[27] However, again, ComEd's guesstimate includes equipment that is either (a)

- pole extension mount (off the pole above the pole) (Label B)
- radio (unusable space) (Label H)
- load center part (unusable space) (Label J)
- fiber interconnect terminals (unusable space) (Label I)
- long copper clad steel rod (unusable space, ***underground***)(Label D)
- U-Guard (e.g., vertical riser) (ancillary) (Label F)

[24] *Texas Cablevision Co. v. Southwestern Elec. Power Co.*, Memorandum Opinion and Order, PA-84-0007, 1985 FCC LEXIS 3818, ¶ 6 (1985) (holding that ancillary equipment, such as risers, and any equipment in the unusable space should be excluded in calculating the amount of usable space occupied by an attachment).

[25] Complaint, Attachment B, Ex. 1, CCF125 (Label B).

[26] Complaint, Attachment B, Ex. 1, CCF124 (Label V).

[27] Answer p. 52.

ancillary, (b) located off the pole, (c) in the unusable space, or (d) within space occupied by another piece of equipment.[28] Thus, for the same reasons discussed above, ComEd's assertion regarding this configuration reflects ComEd's disregard for well-established Commission precedent governing the calculation of usable space occupied. ComEd's arguments, which include even equipment that is not on the pole, are clearly not credible and should be rejected.

Finally, ComEd contends that "Crown Castle offers no proof that what they have installed is consistent with the specifications that they cite."[29] Contrary to ComEd's assertion, Maureen Whitfield submitted with her declaration the wireless node configurations that Crown Castle has deployed on ComEd poles as well as wireless node construction drawings that ComEd has approved (and thus could be used by Crown Castle in the future).[30] ComEd does not dispute that the diagrams and configurations are accurate. Nor does ComEd introduce any evidence demonstrating that Crown Castle has installed wireless equipment that is larger than what Crown

[28] Answer p. 52, citing the following equipment not in the useable space:

- antenna (off the pole above the pole) (Label A)
- RRUS facilities (unusable space) (Label C)
- hybrid coupler (unusable space) (Label F)
- power supply (unusable space) (Label G)
- disconnect box (unusable space) (Label H)
- outdoor telco box (unusable space) (Label I)
- power cables (ancillary) (Label J)
- fiber cables (Label K) – ComEd has counted a standard fiber attachment as part of the wireless equipment.
- ground rods (unusable space, underground) (Labels O and P)
- flexi zone radio (Label U) (this is within the space occupied by the Antenna Kit (Label V), which is larger than the antenna).
- U-Guard (e.g., vertical riser) (ancillary) (Label M)

As noted, several of the items ComEd counts are not only in the unusable space, but occupy the same space on the pole, so that ComEd is counting the same space multiple times.

[29] Answer pp. 51 - 52.

[30] Complaint, Attachment B, Exhibits 1-7, CCF123 to CCF205.

Castle introduced. Rather, ComEd only disputes that they occupy space other than usable space which, in its opinion, should be chargeable. In calculating its refund request, Crown conservatively assumed that all of its configurations occupied the same amount of space as its largest configuration.

Thus, Crown Castle has demonstrated that, at most, 6 feet is the largest amount of usable space occupied by its wireless node attachment. ComEd has the applications and detailed information submitted by Crown Castle for every attachment. If ComEd contends that Crown Castle has installed attachments not reflected by the diagrams, ComEd has failed to provide any evidence supporting that contention or any evidence that Crown Castle's attachments occupy more than 6 feet of usable space.

V. THE COMMISSION SHOUD REQUIRE COMED TO ACCOUNT FOR THE IMPACT OF TRANSFERING ACCUMULATED DEFERRED INCOME TAXES IN FERC ACCOUNTS CURRENTLY CAPTURED IN THE RATE FORMULA TO ANY OTHER FERC ACCOUNTS

Despite the fact that at least two state regulatory commissions, and other investor owned utilities,[31] agree that an adjustment is necessary to account for the transfer of excess ADIT resulting from the Tax Cut and Jobs Act ("TCJA") into an account not currently captured in the pole attachment rate formula, ComEd argues that "[t]he formula does not specify that other FERC accounts should be used in the formula to calculate accumulated deferred income taxes"[32] and that making the adjustment requested by Crown Castle in its Rate Complaint requires a rulemaking.[33] In fact, the Commission has long held that accumulated deferred taxes should be excluded from net pole investment and the Commission may revise pole attachment formula

[31] Complaint ¶ 41.

[32] Answer pp. 35, 41, 43, 44, 45, 47, 49, 61.

[33] *See e.g.*, Answer pp. iv, 36, 41, 43, 44, 45, 47, 49, 58, 61, 62.

inputs in response to a complaint where, as here, doing so is necessary to ensure just and reasonable pole attachment rents. Moreover, the Commission's deduction of accumulated deferred taxes is predicated on the states' handling of the issue for utility ratemaking purposes. Accordingly, the decisions rendered by the Public Utility Commission of Ohio ("PUCO") and the Public Utility Regulatory Authority of Connecticut ("PURA"), approving negotiated adjustments agreed to by AEP Ohio and Connecticut Light and Power, warrant the Commission's consideration in this proceeding.

A. The Commission May Modify Pole Attachment Formula Inputs in the Context of an Adjudicatory Proceeding Where Doing So is Necessary to Ensure Just and Reasonable Rates

The Commission first directed utilities to subtract accumulated deferred taxes from pole investment in 1987 when it switched to the tax normalization approach in resolving pole attachment cases.[34] It did so because, for financial reporting purposes, under tax normalization, utilities depreciate equipment over its estimated useful life. In contrast, for tax purposes, utilities accelerate depreciation, claiming higher depreciation expenses in the asset's early years of the service life and lower depreciation in later years, resulting in lower tax payments in early years offset by higher payments in later years. The amount of income taxes deferred through the use of accelerated depreciation is recorded for accounting purposes in an *accumulated deferred tax* reserve. As explained by the FCC at the time it began requiring the deduction of ADT from net pole investment:

> Most regulatory commissions, concluding that the accumulated deferred tax reserve represents cost free capital, adjust for the cost-free nature of the reserve in one of two ways to prevent the utility from earing a return on the portion of its investment financed by

[34] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd 4387 ¶¶ 45-52 (1987) ("1987 Order"). Prior to this order, the Commission used a "taxes paid" (flow through) methodology.

> the reserve. The majority of commissions which follow the normalization practice deduct the depreciation related deferred income taxes from the utility's rate base, creating a smaller rate upon which the allowed rate of return may be earned. Some commissions follow the alternative ratemaking treatment of including the reserve in the utility's capital structure at zero cost, which has the effect of reducing the authorized rate of return.[35]

To ensure a uniform approach that was reasonable and easy for *attachers* to verify using publicly available data, the Commission accounted for the impact of accumulated deferred taxes by requiring pole owners to follow the approach adopted by its state regulatory commission for general ratemaking purposes and relying upon the FERC accounts which, at the time, were known to include accumulated deferred taxes.[36] Thus, where the state adjusted for deferred taxes as a rate base deduction, the pole attachment formula would reflect the same methodology. Alternatively, if the state included the reserve in the utility's capital structure at zero cost, effectively lowering the rate of return then that was the method to be used. The point was to prevent utilities from earning a return on cost-free capital through the pole attachment rental rate.

The Illinois Commerce Commission, as recently as 2012, identified the same concern, explaining in response to ComEd's proposed rate adjustments that:

> ADIT, a derivative adjustment that is caused primarily by plant additions, is a source of revenue for a utility. Because federal tax laws regarding 2011 allow businesses like ComEd, currently, to depreciate plant additions at 100%, ComEd has use of funds now that it would not have otherwise normally have had access to without borrowing or other forms of financing. In effect, ignoring this windfall to ComEd would be to allow ComEd an interest-free loan at the ratepayers' expense for several months.

[35] 1987 Order at ¶46. State regulatory commissions in setting electric service rates as well as other utility charges, not just for poles in certified states.

[36] *Id*. at ¶ 52. The FERC accounts that reflect accumulated deferred taxes are 218, 282, 283 and 190.

> It also would artificially increase rates until the time when a final order in the 2011 reconciliation docket takes place.[37]

The fact that utilities recently transferred excess ADIT created by TJCA to accounts other than those used in the pole attachment rate formula does not change the underlying rationale for excluding excess ADIT from the rate base – ComEd will continue to enjoy the use of this cost-free capital until the excess amounts are returned to ratepayers (which in Illinois, will be over the useful life of the equipment – 39.47 years in the case of poles).[38] Crown Castle simply asks the Commission to ensure that these amounts are excluded from the pole attachment rate base, consistent with the intent of the Commission's rules and the ICC's approach. Contrary to ComEd's assertion in its Answer, failing to do so would "change the intent of the [TCJA]"[39] in ComEd's favor by creating an unearned windfall for ComEd.

Moreover, contrary to ComEd's assertion, the Commission need not open a rulemaking proceeding in order to rectify the excess ADIT issue. Indeed, the Commission has, in adjudicatory proceedings, permitted modification to FERC accounts used in the federal pole attachment formula, albeit only in unique circumstances where, as here, doing so is necessary to ensure that the formula produces just and reasonable rates.[40] For example, in, *Group W Cable Inc. v. Wisconsin Electric Power Co.*, because of Wisconsin's unique regulatory requirement, an electric utility included accrued deferred taxes in its publicly reported depreciation reserves.[41] At

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[37] *Commonwealth Edison Company Formula rate tariff and charges authorized by Section 16-108.5 of the Public Utilities Act*, Order, Docket 11-0721 (May 29, 2012) at 59 *available at* https://www.icc.illinois.gov/docket/files.aspx?no=11-0721&docId=182671.

[38] Complaint ¶ 39.

[39] *See* Answer at iv.

[40] *Group W Cable Inc. v. Wisconsin Electric Power Co.*, PA-82-0062, ¶8, 1985 FCC LEXIS 3476 (April 19, 1985).

[41] *See id.*

the time, the Commission had not yet adopted the tax normalization approach, and thus, accumulated deferred taxes did not factor into the rate formula. Accordingly, the Commission agreed with the utility that it should remove accrued deferred taxes from the utility's publicly reported depreciation reserves, resulting in a higher net investment figure and attachment rate.[42]

Similarly, in *TeleCable of Piedmont, Inc. v. Duke Power Co.*, a pole attachment complaint proceeding, the electric utility's poles were damaged by Hurricane Hugo.[43] Consequently, the utility calculated its maintenance expense carrying charge by including Account 407.3, in addition to Account 593.[44] The Commission held that, due to the unique circumstance in that case (i.e., damage to Duke's distribution system caused by the hurricane not captured in Account 593), it was permissible to include Account 407.3 in its maintenance expense carrying charge.[45]

In this case, as set forth in the Complaint, it appears that ComEd has transferred excess ADIT to an account not included in the pole attachment rate formula, as many utilities across the country did in 2017 to account for the tax savings afforded by the TCJA and resultant over collection of ADIT. While ComEd refuses to provide the information requested by Crown in its interrogatories, the requested information would confirm the amounts transferred. Once that information is supplied, the Commission could order similar accounting adjustments to those adopted in other cases to ensure that Crown Castle does not pay a return on cost-free capital

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[42] *See id*. at 10.

[43] *TeleCable of Piedmont, Inc. v. Duke Power Co.*, DA 95-1362, Hearing Designation Order, 10 FCC Rcd 10898, ¶¶ 19-20 (June 15, 1995) (previously referenced in Crown Castle Pole Attachment Complaint – Unlawful Rates, ¶ 80).

[44] *See id.* at ¶19. Account 407.3 reflected the costs of repairing damage to Duke's distribution system caused by Hurricane Hugo.

[45] *See id.* at ¶19.

solely as result of ComEd's tax rate reduction, which is widely understood to be an unreasonable consequence of the TCJA.

B. The PUCO Solution, Which Debits and Credits FERC Accounts Used in the FCC Formula to Account for the ADIT transfer, Presents a Just and Reasonable Solution

As set forth above, at the time the Commission switched to tax normalization for development of pole attachment rates, it deferred to methodologies employed by state public utility commissions to ensure that attachers did not pay a return on the utility's cost-free capital. Accordingly, contrary to ComEd's arguments, it most certainly would be appropriate and prudent for the Commission in this proceeding to defer to the approaches adopted by the Ohio and Connecticut state regulatory commissions in cases applying close variations of the FCC formulas.

In the Ohio proceeding described in Crown Castle's Complaint,[46] including Ohio Power Company, all agreed adjustments needed to be made to the publicly reported FERC accounts used in the pole attachment formula to account for the transferred ADIT. Describing the solution agreed upon in Ohio, the public utility commission explained:

> Regarding the accounting for [excess accumulated deferred income taxes] EDIT as it relates to the Federal Communications Commission's pole attachment formula, the normalized EDIT will be amortized each year using the average rate assumption method. The entry includes debits to accounts 2821001 and 2545001 and credits to accounts 4111001,[47] 2824001 and 1904001. The non-normalized EDIT will be amortized each year for the number of

[46] Complaint ¶ 41.

[47] In its Answer, ComEd asserts that FERC 411 information is irrelevant to the Commission's pole attachment formula and not used to reflect ADIT. Answer pp. 35, 38, 40. In fact, as explained in the FERC Uniform System of Accounts Instructions, codified in 18 C.F.R. Pt. 101, Accounts 411.1 and 411.2 "shall be credited**,** and Accumulated Deferred Income Taxes shall be debited, with amounts equal to any allocations of deferred taxes originating in prior periods or any current deferrals of taxes on income, as provided by the texts of accounts 190, 281, 282, and 283.[47] 18 C.F.R. § Pt. 101, special instructions, accounts 410.1, 410.2, 411.1, and 411.2.

> years as determined by the Commission. The entry includes debits to accounts 2821001, 2831001, and 25444001 and credits to accounts 4111001, 2824001, 2814001, and 1904001. The amortization of normalized and non-normalized EDIT, which is recorded in account 4111001, is included on line 18, page 114 of the Federal Energy Regulatory Commission (FERC) Form 1. This results in the entire unamortized balances of the normalized and non-normalized EDIT being reflected in the pole attachment calculation, along with the federal income tax savings (reflected in the FERC Form 1 being used to perform the pole attachment calculation."[48]

Likewise, in Connecticut, PURA, Eversource and the New England Cable Television Association agreed that Eversource would "reduce Eversource's total gross plant and gross pole investment by the amount of any unamortized Accumulated Deferred Income Tax ("ADIT") expense resulting from the Federal Tax and Job Cuts Act of 2017, in addition to ADIT and depreciation reserves."[49]

Thus, this solution is hardly controversial, is consistent with the ICC's treatment of ADIT in ComEd's general electricity rate cases, and can be easily accomplished once ComEd provides the responsive information.

VI. OTHER ADJUSTMENTS TO THE CALCULATIONS WILL BE NECESSARY TO REFLECT INFORMATION PROVIDED BY COMED IN RESPONSE TO CROWN CASTLE'S INTERROGATORIES

A. ComEd's Use of the Commission's Presumptions for Pole Height and Appurtenances Require Further Review

[48] *See* Complaint, ¶41, Attachment J, CCF475-476 (*Ohio Power Company's Implementation of the Tax Cuts and Jobs Act of 2017; Application of Ohio Power Company to Amend Its Tariffs,* Case No. 18-1008-EL-UNC; 18-1451-EL-ATA (Oct. 3, 2018))(emphasis added).[48]

[49] *See* Complaint, ¶41, Attachment K, CCF481 - CCF486, *Application of The Connecticut Light and Power Company d/b/a Eversource to Amend its Rate Schedules*, Approval of Amended Compliance Filing, CT PURA Docket No. 17-10-46 (Feb. 14, 2019); *Application of The Connecticut Light and Power Company d/b/a Eversource to Amend its Rate Schedules*, Amended Compliance Filing & Resolution of NECTA's Objections Raised in Motion Nos. 46 & 47,CT PURA Docket No. 17-10-46 (Feb. 5, 2019).

In its second and third responses to Crown Castle's First Set of Interrogatories, ComEd provided information related to pole height and appurtenances that suggest that the Commission's presumptions for average pole height (37.5 feet) and its appurtenances (15%) are too low. While ComEd only provided responsive information for 2017 and 2018, the responses show the following.

Pole Height

Based upon the information provided by ComEd, it appears that its average pole height is closer to 40 feet.[50]

Appurtenances

Based upon the information provided ComEd for its 364 continuing property records, its investment in appurtenances (in this case, conservatively counting only cross arms, equipment mounting brackets and transformer mounting brackets) is closer to [redacted]%.[51]

Moreover, ComEd refuses to provide information that is responsive to Crown Castle's requests for this information years predating 2017.

B. Additional Information Sought By Crown Castle Will Require Further Adjustments to the Rates

As set forth herein, ComEd refuses to provide information concerning its treatment of ADIT in its 2017 and 2018 FERC Form 1 submissions. Crown Castle intends to file a motion to compel the production of this information. In addition, Crown Castle is propounding further interrogatories along with this Reply, including interrogatories concerning how ComEd has

[50] *See* Attachment A hereto, Pole Height Calculation.

[51] *See* Attachment B hereto, Appurtenance Calculation.

accounted for the nearly $[redacted] in payments from Crown Castle for pole replacements.[52] Pursuant to the Commission's rule 1.1406(b), "The Commission shall exclude from actual capital costs these reimbursements received by the utility from cable operators and telecommunications carriers for non-recurring costs." If ComEd's Account 364 includes the value of the poles paid for by Crown Castle, pole investment must be reduced accordingly.

Accordingly, Crown Castle requests the right to further adjust the FCC formula calculations upon completion of discovery.

REPLY TO AFFIRMATIVE DEFENSES

VII. COMED'S AFFIRMATIVE DEFENSES ARE MERITLESS

A. The FCC Has Jurisdiction Over This Complaint

After briefing from the parties, the Enforcement Bureau determined in a July 15 Order that it has jurisdiction to hear and decide Crown Castle's Complaint. Consequently, ComEd's arguments to the contrary are misplaced.[53] In response to ComEd's continued insistence that the Commission lacks jurisdiction to decide Crown Castle's Complaint, Crown Castle hereby incorporates herein by reference the arguments set forth in its opposition to ComEd's motion to dismiss without repeating them here.[54]

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[52] *See Crown Castle Fiber LLC v. Commonwealth Edison Co.*, Proceeding Number 19-169 Bureau ID Number EB-19-MD-004, Crown Castle Reply to Respondent's Answer, Attachment A, Exs. 1-2.

[53] Answer pp. 1-2 (Affirmative Defense ¶ 1).

[54] Crown Castle Opposition to Respondent's Motion to Dismiss for Lack of Jurisdiction, Proceeding No. 19-170, Bureau ID No. EB-19-MD-005 (filed July 8, 2019); Crown Castle Opposition to Respondent's Motion to Hold Proceedings in Abeyance, Proceeding No. 19-170, Bureau ID No. EB-19-MD-005 (filed July 8, 2019) (attached hereto as Attachment C).

B. Crown Castle Provides Telecommunications Service

ComEd's affirmative defense arguing that Crown Castle does not provide telecommunications service is meritless.[55] Crown Castle's existing and planned facilities attached to ComEd's utility poles in Illinois will be used to provide a variety of telecommunications services to enterprise, institutional, governmental, educational, and carrier customers throughout the state.[56] The federal Communications Act ("Act") defines "telecommunication service" as

> The offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.[57]

Similarly, the Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[58] Crown Castle's service offerings utilizing attachments to ComEd poles consist of providing transport of Crown Castle's customers' communications between fixed points designated by the customers without alteration of the content of the communications.[59] Crown Castle offers its services for a fee directly to the public, as defined by federal law.[60] Therefore, Crown Castle's service meets the federal definition of "telecommunication service."

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[55] Answer pp. 6-10 (Aff. Def. ¶¶ 15-27).

[56] Declaration of Donald Russell ("Russell Decl.") ¶¶ 4, 12 (attached hereto as Attachment D).

[57] 47 U.S.C. § 153(53).

[58] 47 U.S.C. § 153(50).

[59] Russell Decl. ¶ 4.

[60] Russell Decl. ¶ 4.

As a threshold matter, Crown Castle's status as a provider of telecommunications service has been confirmed by the ICC through its issuance of a Certificate of Service Authority.[61] ComEd cannot now collaterally attack the ICC's determination. The FCC has held the issuance of a Certificate by a state expert agency is *prima facie* evidence that a company is a telecommunications provider for purposes of the Act, and companies are entitled to rely on expert agency decisions establishing their status.[62] In addition, several courts have recognized that Crown Castle provides telecommunications services, including service provided via distributed antenna system ("DAS") networks, which networks are described in detail below.[63]

1. Crown Castle Is Providing Common Carrier Telecommunications Services

ComEd incorrectly asserts that because Crown Castle provides its services "with individual terms and conditions on a private carrier basis," it is not a common carrier and thus is not providing telecommunications service.[64] Yet, it is well-established that the Act does not require Crown Castle to serve the entire universe of consumers to qualify as a common carrier. Indeed, specialized transport of use to only a limited universe of consumers or wholesale service to a limited universe of other carriers who then provide retail service clearly qualify as a

[61] Complaint ¶ 3.

[62] *See Fiber Techs. Networks v. N. Pittsburgh Tel. Co.*, 22 FCC Rcd. 3392, 3396 (2007).

[63] *See, e.g., Crown Castle NG Atl. LCC v. City of Newport News*, No. 4:15CV93, 2016 WL 4205355, at *3 (E.D. Va. Aug. 8, 2016) ("Crown Castle is a corporation that provides telecommunications services . . . ."); *NextG Networks of New York, Inc. v. City of New York*, No. 03 CIV 9672 RMB/JCF, 2006 WL 538189, at *1 (S.D.N.Y. Mar. 6, 2006), *aff'd in part, rev'd in part sub nom. NextG Networks of NY, Inc. v. City of New York*, 513 F.3d 49 (2d Cir. 2008) (describing NextG Networks of NY, Inc., a predecessor to Crown Castle, as "a provider of telecommunications services"); *Crown Castle NG East LLC v. Pa. Pub. Util. Comm'n*, 188 A.3d 617 (Pa. Commw. Ct. 2018) ("DAS network operators' transport service . . . is a telecommunications service . . . ."), *appeal granted*, 200 A.3d 7 (Pa. 2019).

[64] Answer pp. 9-10 (Aff. Def. ¶ 25).

telecommunications service. For example, in analyzing the phrase "to the public," as used in the Act, the United States Court of Appeals for the District of Columbia Circuit explained over 40 years ago:

> This does not mean that the particular services offered must practically be available to the entire public; ***a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to service indifferently all potential users***.[65]

All that is required to qualify as a telecommunications service under the Act is for a carrier to serve "indiscriminately . . . the clientele [it is] . . . suited to serve."[66] Crown Castle's telecommunications service, including its "RF transport service," is offered on a wholesale basis to all potential users (for RF transport service, potential users include interested wireless carrier-customer) and Crown Castle's enterprise fiber services are also offered to the relevant universe of potential users. Consequently, Crown Castle is acting as a common carrier in Illinois and is providing telecommunications service. Under the Commission's *Fiber Tech* decision, Crown Castle is entitled to rely on its certificate.

2. Crown Castle's Antennas Are An Integrated Part Of Its RF Transport Telecommunications Service And Are Thus Subject To The Commission's Jurisdiction

While the majority of the fiber Crown Castle has deployed and plans to deploy on ComEd's poles will provide telecommunications service to enterprise customers, Crown Castle also plans to provide a telecommunications service called "RF transport service."[67] "RF

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[65] *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (emphasis added).

[66] *Consol. Commc'ns of Fort Bend Co. v Pub. Util. Comm'n of Tex.*, 497 F. Supp. 2d 836, 843 (W.D. Tex 2007), *aff'g Petition of Sprint Comm Co LP*, 2006 WL 2366391 (Tex. PUC, Aug 14, 2006) (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976)).

[67] Complaint ¶ 4.

transport service" is essentially a trade name that refers to the fact that Crown Castle is transporting, via its fiber optic lines, the radio frequency ("RF") signals of its customers, who are themselves providers of wireless services.[68] "RF transport," however, does not refer to transport over the air via radio frequencies.[69] Instead, Crown Castle provides RF transport service between points chosen by its customers using fiber optic lines that are configured in what are sometimes called Distributed Antenna System ("DAS") or small cell networks.[70] With its RF transport service, Crown Castle transports communications for customers over Crown Castle's terrestrial, fiber optic lines between remote "Nodes" located on poles in the public rights of way and a central "Hub" location.[71] The equipment comprising a typical Node in Crown Castle's DAS and small cell networks commonly includes a small, low-power antenna, laser, and amplifier equipment for the conversion of radio frequency, or "RF," signals to optical signals (or vice versa), fiber optic lines, and associated equipment (such as power supplies).[72] The Hub, located on the other end of the fiber optic line from the Node, is a central location that contains such equipment as routers, switches, and signal conversion technology.[73]

Crown Castle's customers for this RF Transport service are generally companies that provide retail wireless service to consumers.[74] These retail wireless carriers, which are also known as "commercial mobile radio service" ("CMRS") carriers, are the entities that hold

[68] Russell Decl. ¶¶ 5-7.

[69] *Id.* ¶¶ 9, 11.

[70] *Id.* ¶ 5.

[71] Russell Decl. ¶ 7.

[72] *Id.* ¶ 7.

[73] *Id.* ¶ 8.

[74] *Id.* ¶ 6.

licenses from the FCC to use and control radio frequencies.[75] CMRS carriers are the entities that provide personal wireless service to end-user wireless customers.[76] All radio transmissions and wireless services are generated and controlled by the wireless carrier-customer through its equipment that is commonly located at the Hub.[77] Once Crown Castle has transported a communication over its terrestrial, fiber optic facilities to the antenna at the Node, the communication is converted back to an RF signal, but the CMRS carrier-customer controls and furnishes that wireless transmission to its own end-user customer's mobile device.[78]

In its Answer, ComEd presents a meritless argument purporting to show that because Crown Castle is not itself providing wireless telecommunications service using its antenna attachments, such wireless attachments are therefore "unregulated" and not subject to the federal Pole Attachment Act.[79] To deploy facilities that deliver RF transport service, Crown Castle explained that it "attaches equipment that is 'wireless' in nature, as well as equipment that is 'wireline' in nature to ComEd poles."[80] However, contrary to ComEd's claims, the fact that Crown Castle does not provide a "wireless" service means it cannot avail itself of federal pole attachment rights. While the telecommunications *service* it provides—RF transport—is wireline in nature, Crown Castle attaches both wireline (fiber) and wireless (antenna) *facilities* to ComEd poles to deliver such service.[81] ComEd is thus correct that Crown Castle has consistently argued

[75] *Id.* ¶ 9.

[76] *Id.* ¶¶ 6, 9.

[77] *Id.* ¶¶ 8-9.

[78] *Id.*

[79] Answer pp. 2-6 (Aff. Def. ¶¶ 2-14).

[80] Complaint ¶ 4.

[81] Russell Decl. ¶¶ 7-11.

before this Commission and before other courts that Crown Castle itself does not provide CMRS service. However, while Crown Castle does not furnish CMRS, its antenna attachments are an integral part of Crown Castle's RF transport service and are thus covered by Section 224.

Federal law defines "pole attachment" broadly as "***any attachment*** by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."[82] The Act does not discriminate based on the type of attachment, so long as the attachment is placed by a "provider of telecommunications service," such as Crown Castle.[83] The Commission has repeatedly affirmed this interpretation of the Act. In *Heritage Cablevision Associates of Dallas*, the Commission rejected arguments attempting to limit the protections of Section 224 by limiting its purview to a particular type of service or facilities, finding that "a cable operator may seek Commission-regulated rates for ***all*** pole attachments within its system, ***regardless of the type of service provided over the equipment attached to the poles***."[84] The Commission went on to explain that:

> TU Electric, in effect, urges us to find that Congress intended the Commission to address utility misconduct only to the extent that such abuse affects the provision of traditional cable television services to the public, thus leaving utilities free to exercise their monopoly ownership of poles to frustrate attempts by cable operators to expand their service offerings . . . . ***Nothing in the legislative history supports a conclusion that protecting traditional cable television services was Congress's exclusive concern,*** however. While there is no extensive or definitive discussion of this issue in the legislative history, the Senate report specifically referenced testimony "that the introduction of broadband cable services may pose a competitive threat to telephone companies, and that the pole attachment practices of telephone companies could, if unchecked, present realistic dangers of competitive restraint in the future."[85]

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[82] 47 U.S.C. § 224(a)(4) (emphasis added).

[83] 47 U.S.C. § 224(a)(4).

[84] *In re Heritage Cablevision Assocs. of Dallas, L.P.*, 6 FCC Rcd. 7099, 7101 ¶ 12 (1991), *aff'd, Texas Util. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993) (emphasis added).

[85] *Heritage Cablevision*, 6 FCC Rcd. at 7102 ¶ 16 (emphasis added).

The D.C. Circuit affirmed the Commission's decision in *Heritage*, holding that the Commission reasonably interpreted the statutory language to determine that it could regulate pole attachment rates charged by a utility for attachments providing nonvideo service.[86]

In *Selkirk Communications*, the Commission again held that Section 224 covered attachments by cable television operators of equipment used to provide nonvideo services.[87] In 1997, the Commission recognized that the passage of the Telecommunications Act of 1996 affirmed its holdings in *Heritage* and *Selkirk* by amending Section 224 to include providers of telecommunications services.[88]

Ultimately, in the 2011 Pole Order, the Commission recognized that Section 224 and the Commission's pole attachment rules, including rate formulas, apply to DAS networks, such as Crown Castle's.[89]

Crown Castle has been established as a provider of telecommunications services. Moreover, its wireless antenna attachments are an integral part of one type of telecommunications service that Crown Castle provides, called RF transport service.[90] It is thus immaterial whether Crown Castle is utilizing the antennas to provide over-the-air wireless telecommunications service, itself, because Crown Castle incorporates the antennas in its

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[86] *Texas Util. Elec. Co.*, 997 F.2d at 936 ("[I]t is consistent with the congressional purpose to avoid abusive pole attachment practices by utilities for the FCC to regulate any attachment by a cable operator within its franchise area and within its cable television system.")

[87] *In re Selkirk Commc'ns, Inc.*, 8 FCC Rcd. 387 (1993).

[88] *See In re Marcus Cable Assocs., L.P.*, 12 FCC Rcd. 10362, 10367-68 (1997).

[89] *See, e.g., 2011 Order* at ¶¶ 6 n.13 (access for DAS), 21 n.69 (timelines apply to DAS), 77 n.226 (pole top available for DAS), Separate Statement of Chairman Genachowski ("It also provides a timeline for accessing the tops of poles, which are key for the deployment of wireless broadband technologies like distributed antenna systems. . .").

[90] Russell Decl. ¶ 11.

network to provide RF transport service, a wireline telecommunications service. Consequently, because the Commission has jurisdiction to regulate *any* attachment placed by a "provider of telecommunications service," the wireless antenna attachments integral to Crown Castle's DAS and small cell networks and crucial to Crown Castle's RF transport service are thus subject to the Commission's jurisdiction whether or not the antennas themselves are used by Crown Castle to provide wireless telecommunications service.

3. Crown Castle Is Not Required To Maintain A Tariff To Qualify As A Telecommunications Carrier

ComEd also argues that Crown Castle is not a telecommunications carrier because the Complaint "does not include or reference any tariff on file in Illinois to govern the services provided by Crown."[91] ComEd's argument is meritless because Illinois law does not require Crown Castle to maintain a tariff. Crown Castle is a competitive telecommunications provider that has de-tariffed in accordance with the ICC's rules. Pursuant to Illinois Public Utility Act ("PUA") Section 13-501 and the ICC's August 3, 2013 memorandum,[92] Crown Castle submitted a letter on November 2, 2016 withdrawing its prior tariff issued under its previous name RCN New York Communications, LLC d/b/a RCN Metro Optical Networks.[93] Because Crown Castle has de-tariffed in accordance with relevant law, a tariff is not required to comply with the ICC's regulations, and ComEd's argument should be rejected.

C. Crown Castle Is The Proper Party To This Proceeding

ComEd also seeks to take issue with whether Crown Castle is the proper party to bring this Complaint. ComEd argues that Crown Castle does not have a Certificate from the ICC. It

[91] Answer p. 9 (Aff. Def. ¶ 23).

[92] A copy of the ICC's August 3, 2013 memorandum is attached hereto as Attachment E.

[93] A file stamped copy of the letter is attached hereto as Attachment F.

also argues that Crown Castle is not a party to any of the three pole attachment agreements, and that ComEd never received notice of any transfer to Crown Castle.[94] ComEd's arguments are meritless. As demonstrated below, Crown Castle is the proper party to the three pole attachment agreements as the result of various corporate events, none of which has ever constituted a transfer or assignment that triggered the notice and consent provisions of the pole attachment agreements. Moreover, ultimately, even if some corporate event had technically triggered the provision requiring notice and consent to ComEd, ComEd has no basis to have ever denied consent, and ComEd's admission that for the past two years it has granted Crown Castle attachment to hundreds of poles undercuts its argument that Crown Castle has no rights under any of the pole attachment agreements identified in the Complaint.

1. Crown Castle Fiber LLC Is Authorized To Provide Telecommunications Services In Illinois Pursuant To Certificates Of Service Authority Obtained By RCN New York Communications, LLC

In 2007, the ICC granted RCN New York Communications, LLC ("RCN") a Certificate of Interexchange Service Authority to provide interexchange facilities-based telecommunications services in Illinois, a Certificate of Service Authority to provide resold local and interexchange telecommunications services, and a Certificate of Exchange Service Authority to provide local facilities-based telecommunications services in Illinois (the "RCN CPCN").[95] Crown Castle Fiber LLC *is the same entity* granted the RCN CPCN as the result of several name changes. On November 18, 2010, RCN changed its name to Sidera Networks, LLC.[96] Sidera Networks, LLC

[94] Answer pp. 11-14 (Aff. Def. ¶¶ 28-33).

[95] Complaint, Attachment A, Ex. 6, CCF102 – CCF107.

[96] Declaration of Neil Dickson ("Dickson Decl.") ¶ 4, Ex. 1 (attached hereto as Attachment G).

changed its name to Lightower Fiber Networks II, LLC, on October 1, 2014.[97] Lightower Fiber Networks II, LLC changed its name to Crown Castle Fiber LLC on May 16, 2018.[98] Thus, Crown Castle Fiber LLC is the entity granted the RCN CPCN by the ICC.

2. NextG Networks of Illinois, Inc. Path To Crown Castle Fiber LLC

In 2003, the ICC granted NextG Networks of Illinois, Inc. a Certificate of Interexchange Service Authority to provide interexchange facilities-based telecommunications services, Certificate of Service Authority to provide resold local and interexchange telecommunications services in Illinois, and a Certificate of Exchange Service Authority to provide local facilities-based telecommunications services.[99] On May 3, 2012, NextG Networks of Illinois, Inc. changed its name to Crown Castle NG Central Inc.[100] Crown Castle NG Central Inc. then converted into to Crown Castle NG Central LLC on December 20, 2013.[101]

Crown Castle NG Central LLC was subsequently merged into Crown Castle Fiber LLC, which was an affiliate of Crown Castle NG Central LLC via common ownership, effective as of 11:59 pm on December 31, 2018.[102] Due to its merger into Crown Castle Fiber LLC, which already held Certificates of Authority from the ICC (as discussed above), Crown Castle NG Central LLC requested the ICC to cancel its Certificates of Service Authority to provide

[97] Dickson Decl. ¶ 4, Ex. 2.

[98] Complaint, Attachment A, Ex. 5, CCF88 – CCF101.

[99] Complaint, Attachment A, Ex. 7, CCF110.

[100] Dickson Decl. ¶ 5, Ex. 3.

[101] *Id.* ¶ 5, Ex. 4.

[102] *Id.* ¶ 6, Ex. 5.

competitive facilities-based and resold local exchange and interexchange telecommunications service in Illinois.[103] On March 6, 2019, the ICC granted this request.[104]

3. Sunesys, LLC Path To Crown Castle Fiber LLC

In 2006, the ICC granted Sunesys, LLC a Certificate of Interexchange Service Authority to operate as a provider of facilities-based interexchange telecommunications services.[105] Sunesys, LLC was ultimately merged into Crown Castle Fiber LLC, which was an affiliate of Sunesys, LLC via common ownership.[106]

Due to its merger into Crown Castle Fiber LLC, Sunesys, LLC requested the ICC to cancel its Certificates of Service Authority to provide competitive facilities-based and resold local exchange and interexchange telecommunications service in Illinois.[107] On March 6, 2019, the ICC granted this request.[108]

D. Crown Castle Fiber LLC Is The Correct Party Under The Pole Attachment Agreements

ComEd seeks to take issue with Crown Castle as the party to this proceeding, misguidedly asserting that it "does not believe it has a written pole attachment agreement with Crown Castle because ComEd is unaware of any valid written notification of assignment of any of the pole attachment agreements with NextG, Sunesys, and Lightower, nor did ComEd provide any prior written consent to any such assignments."[109] As explained, below Crown Castle has

[103] Complaint, Attachment A, Ex. 7, CCF109-111.

[104] *See id.*

[105] Complaint, Attachment A, Ex. 7, CCF113.

[106] Dickson Decl. ¶ 7, Ex. 7.

[107] Complaint, Attachment A, Ex. 7, CCF112-114.

[108] *See id.*

[109] Answer p. 11, ¶ 28.

never been required to provide notice to or obtain consent from ComEd under the assignment provisions in the pole attachment agreements that ComEd executed with NextG Networks of Illinois, Inc., Sunesys, Inc., and Sidera Networks, LLC d/b/a Lightower Fiber Networks.

4. Crown Castle Fiber LLC Has Attachment Rights Under the Pole Attachment Agreement Executed by Sidera Networks, LLC and ComEd

Crown Castle Fiber LLC is the proper entity to file a complaint under the pole attachment agreement executed by Sidera Networks, LLC d/b/a Lightower Fiber Networks and ComEd ("Lightower Pole Attachment Agreement") on July 26, 2013. Section 16.1 of the Lightower Pole Attachment Agreement provides:

[redacted][110]

As discussed above, Sidera Networks, LLC changed its name to Lightower Fiber Networks II, LLC on October 1, 2014. Because Sidera Networks LLC merely changed its name and did not "assign or transfer all or any portion of its rights, privileges and obligations" under the Lightower Pole Attachment Agreement with ComEd, Lightower Fiber Networks II was not required to obtain ComEd's consent under Section 16.1 of the Lightower Pole Attachment Agreement.

[110] Complaint, Attachment A, Ex. 3 CCF66.

Crown Castle International Corp., through several indirect subsidiaries, acquired Lightower Fiber Networks II, LLC on November 1, 2017.[111] Lightower Fiber Networks II's existence remained unchanged, however, other than a change of its ultimate parent entity. Because Lightower Fiber Networks II did not change, it did not "assign or transfer all or any portion of its rights, privileges and obligations" under the Lightower Pole Attachment Agreement. Consequently, Lightower Fiber Networks II was not required to obtain ComEd's consent under Section 16.1 of the Lightower Pole Attachment Agreement of this transaction which involved only a change in the ultimate ownership of Lightower Fiber Networks II.

As discussed above, Lightower Fiber Networks II, LLC changed its name to Crown Castle Fiber LLC on May 16, 2018.[112] Because Lightower Fiber Networks II, LLC merely changed its name and did not "assign or transfer all or any portion of its rights, privileges and obligations" under the Lightower Pole Attachment Agreement, Crown Castle Fiber LLC was not required to obtain consent from ComEd under Section 16.1 of the Lightower Pole Attachment Agreement.

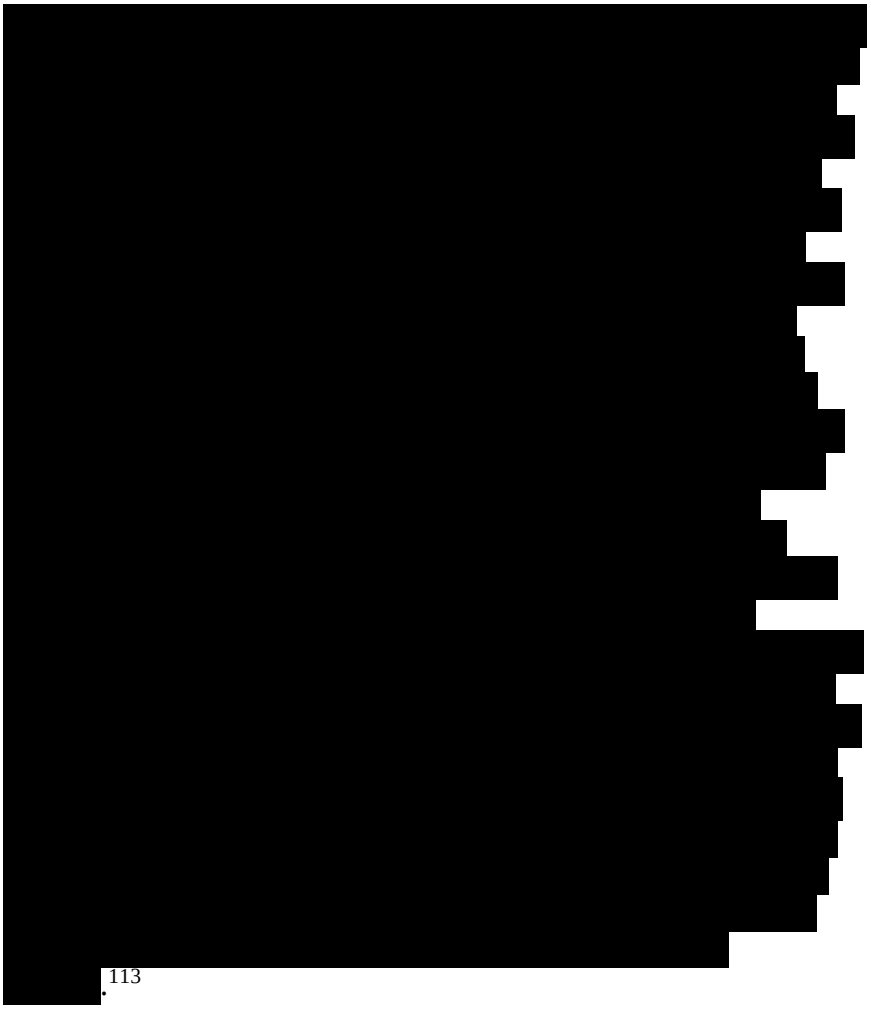
5. Crown Castle Fiber LLC Is the Successor-In-Interest to the Pole Attachment Agreement Executed by NextG Networks of Illinois, Inc. and ComEd

Crown Castle Fiber LLC is the proper entity to file a complaint under the pole attachment agreement executed by NextG Networks of Illinois, Inc. and ComEd ("Crown Castle Pole Attachment Agreement") on December 22, 2004. No notice to or approval by ComEd was required. Section 15.1 of the Crown Castle Agreement provides:

[redacted]

[111] Dickson Decl. ¶ 4, Ex. 2.

[112] Complaint, Attachment A, Ex. 5, CCF88-101.



.[113]

In 2012, NextG Networks, Inc., which wholly-owned NextG Networks of Illinois, Inc., was acquired by Crown Castle International Corp., via a merger with an indirect subsidiary of Crown Castle International Corp.[114] NextG Networks of Illinois, Inc. continued unchanged, other than a change in its ultimate parent entity.[115] As a result, NextG Networks of Illinois, Inc. did not "assign or transfer all or any portion of its rights, privileges and obligations" under the Crown Castle Pole Attachment Agreement with ComEd. Therefore, NextG Networks of Illinois,

[113] Complaint, Attachment A, Ex. 1 CCF24.

[114] Dickson Decl. ¶ 5.

[115] *Id.*

Inc. was not required to obtain consent from or provide notice to ComEd pursuant to Section 15.1 of the Crown Castle Pole Attachment Agreement.

NextG Networks of Illinois, Inc., changed its name to Crown Castle NG Central Inc. on May 3, 2012.[116] Because NextG Networks of Illinois, Inc. merely changed its name and did not "assign or transfer all or any portion of its rights, privileges and obligations" under the Crown Castle Pole Attachment Agreement, the company was not required obtain consent from or provide notice to ComEd pursuant to Section 15.1 of the Crown Castle Pole Attachment Agreement.

Subsequently, Crown Castle NG Central, Inc. converted into to Crown Castle NG Central LLC on December 20, 2013 via a merger.[117] Because Crown Castle NG Central, Inc. changed its corporate form from a corporation to a limited liability company and did not "assign or transfer all or any portion of its rights, privileges and obligations" under the Crown Castle Pole Attachment Agreement, Crown Castle NG Central LLC was not required obtain consent from or provide notice to ComEd pursuant to Section 15.1 of the Crown Castle Pole Attachment Agreement.

Finally, Crown Castle NG Central LLC was merged into Crown Castle Fiber LLC, an affiliate of Crown Castle NG Central LLC, effective as of 11:59 pm on December 31, 2018.[118] First, by this merger, Crown Castle NG Central LLC did not "assign or transfer all or any portion of its rights, privileges and obligations" under the Crown Castle Pole Attachment Agreement

[116] *Id.* ¶ 5, Ex. 3.

[117] *Id.* ¶ 5, Ex. 4.

[118] *Id.* ¶ 6, Ex. 5.

because it is well settled law that a merger is not an assignment or transfer.[119] Second, in addition, even if an assignment or transfer were found to have occurred, Crown Castle Fiber LLC was not required obtain consent from or provide notice to ComEd pursuant to Section 15.1 of the Crown Castle Pole Attachment Agreement because Crown Castle NG Central LLC merged into an affiliate. Section 15.1 of the Crown Castle Pole Attachment Agreement exempts affiliate transactions from the notice and approval requirement, stating "that Licensee may assign or transfer its rights, privileges and obligations to a parent, affiliate or subsidiary company without prior written notice to ComEd."

6. Crown Castle Fiber LLC Is the Successor-In-Interest to the Pole Attachment Agreement Executed by Sunesys, Inc. and ComEd

Crown Castle Fiber LLC is the proper entity to file a complaint under the pole attachment agreement executed by Sunesys, Inc. and ComEd ("Sunesys Pole Attachment Agreement") on May 5, 2005. Section 16.1 of the Sunesys Agreement provides:

[119] While Illinois courts have not directly addressed whether a merger like the one involving Crown Castle and NextG constitutes an assignment, other jurisdictions have, and it is well established law that there is no assignment or transfer. *See e.g.*, *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 83 (Del. Ch. 2013); *Disk Authoring Techs. LLC v. Corel Corp*., 122 F. Supp. 3d 98, 112 (S.D.N.Y. 2015). The Model Business Corporations Act further supports this point. Section 11.07(a)(3)-(4) states "all property owned by, and every contract right possessed by, each domestic or foreign corporation or eligible entity that is a party to the merger, other than the survivor, are the property and contract right**s** of the survivor **without transfer**, reversion or impairment. All debts, obligations and other liabilities of each domestic or foreign corporation or eligible entity that is a party to the merger, other than the survivor, are debts, obligations or liabilities of the survivor." Model Business Corporations Act § 11.07(a)(3)-(4) (emphasis added). Moreover, the official comment to this section states: "The survivor automatically becomes the owner of all real and personal property and becomes subject to all the liabilities, actual or contingent, of each other party to the merger. **A merger is not a conveyance, transfer, or assignment.**" *Id.* Official Comment (emphasis added).


[120]

Sunesys, Inc. converted into Sunesys, LLC on December 28, 2006 via a merger, which had the effect of changing the corporate form of the entity.[121] No assignment or transfer occurred to trigger Section 16.1 of the Sunesys Agreement by the change of corporate form to an LLC. Moreover, as noted above, the fact the corporate form change occurred via a merger does not constitute a transfer or assignment.[122]

On August 4, 2015, through a merger at the ultimate parent level, Sunesys LLC became an indirect subsidiary of Crown Castle International Corp.[123] Sunesys LLC's existence remained unchanged, other than its ultimate parent. Because the transaction in 2015 involved only a change at the parent level, Sunesys LLC did not "assign or transfer all or any portion of its rights, privileges and obligations" under the Sunesys Pole Attachment Agreement. As a result, Sunesys LLC was not required to obtain ComEd's consent pursuant to Section 16.1 of the Sunesys Pole Attachment Agreement.

[120] Complaint, Attachment A, Ex. 2, CCF44.

[121] Dickson Decl. ¶ 7, Ex. 6.

[122] *See e.g.*, *Meso Scale Diagnostics*, 62 A.3d at 83; *Disk Authoring Techs.*, 122 F. Supp. 3d at 112; Model Business Corporations Act § 11.07(a)(3)-(4).

[123] Dickson Decl. ¶ 7.

Sunesys, LLC was ultimately merged into Crown Castle Fiber LLC.[124] As stated above a merger is not considered an assignment or transfer; therefore, no consent or notice to ComEd was required.[125]

Ultimately, it is noteworthy that after the various name changes and mergers discussed above, the current Crown Castle Fiber LLC holds assets having a value well in excess of $11 billion based upon the acquisition of those entities and other affiliated entities which have also been merged into Crown Castle Fiber LLC, and has no direct debt.[126] Therefore, the contracting party with ComEd is a substantially larger entity with a greater net worth than Sunesys LLC, Crown Castle NG Central LLC, or Lightower Fiber Networks II, LLC, formerly known as Sidera Networks, LLC. Thus, even if any of the notice provisions had been triggered, ComEd had no good-faith basis to deny consent.

ComEd has no legitimate claim that it did not know that Crown Castle is the current party to the pole attachment agreements. Indeed, it admits that it has permitted Crown Castle to install fiber and wireless attachments to ComEd poles.[127] Clearly, ComEd has understood that Crown Castle was party to the relevant pole attachment agreements. Otherwise, it would not have allowed Crown Castle to attach.

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[124] *Id.*

[125] *See e.g.*, *Meso Scale Diagnostics*, 62 A.3d at 83; *Disk Authoring Techs.*, 122 F. Supp. 3d at 112; Model Business Corporations Act § 11.07(a)(3)-(4).

[126] Dickson Decl. ¶ 8.

[127] Answer ¶ 27.

7. The Crown Castle – Nextel Deal Described in ComEd's Answer is Not Analogous to Any of the Transactions Described in this Section of Crown Castle's Reply

ComEd mistakenly analogizes the transactions described in this section of Crown Castle's Reply to a different transaction that involved transfer of assets. In 2016, Nextel West Corporation ("Nextel") transferred some of its attachments on ComEd-owned poles to Crown Castle.[128] Because this deal involved a transfer of those assets, Crown Castle notified ComEd of the transaction in accordance with Nextel's pole attachment agreement with ComEd, which provided that Nextel "[redacted]."[129]

The Nextel transaction is not analogous to transactions pertaining to the Crown Castle Pole Attachment Agreement, the Sunesys Pole Attachment Agreement, or the Lightower Pole Attachment Agreement. As discussed above, those transactions either involved (a) a merger, (b) a name change, or (c) a change in corporate form. None of the transactions involved an assignment or transfer of assets. Therefore, ComEd's analogy is misplaced.

E. Crown Castle Is Not Only Entitled To Prospective Relief

ComEd argues that because both ComEd and Crown Castle "proceeded for many years with the understanding that the pole attachments at issue" were subject to the ICC's jurisdiction, not the FCC's jurisdiction, the FCC cannot impose its rules "retroactively" under the statute, and it would nevertheless be inequitable and unjust to do so.[130] ComEd's contention is wrong for several reasons.

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[128] Answer pp. 13-14, ¶¶ 31-32.

[129] Answer, Attachment D, CEC26 – CEC58.

[130] Answer pp. 15-23 (Aff. Def. ¶¶ 34-51).

8. The ICC Lacks Jurisdiction To Hear This Complaint

Perversely, ComEd's argument simply emphasizes Crown Castle's point that the ICC does not have jurisdiction to hear this Complaint. As Crown Castle explained, the Commission has jurisdiction over rates, terms, and conditions of pole attachments except "where such matters are regulated by a State."[131] For its part, the ICC has confirmed to the Commission that its pole attachment regulations only apply to attachments by "cable television ('CATV') companies," without making reference to attachments by telecommunications companies.[132] As a result, the ICC does not have the authority to regulate attachments by telecommunications companies to electric utilities' poles, and jurisdiction over such attachments remains with the Commission.[133]

ComEd's theory is that either the ICC had regulatory control, or ComEd reasonably understood that the ICC had regulatory control. However, ComEd's argument that it did not know that it was forbidden from engaging in the egregious behavior described in Crown Castle's Complaint suggests that ComEd understood fully that ICC had no rules governing telecommunications attachments. Moreover, ComEd cites no basis for its belief that it was free to engage in this behavior. The seemingly only logical explanation for such conduct is that ComEd recognized the ICC had no rules regarding attachments by telecommunications providers, which only further underscores Crown Castle's reasoned explanation that the FCC has jurisdiction over this matter.

In any event, contrary to ComEd's contention, the relief Crown Castle seeks in its Complaint does not implicate "retroactivity" concerns. ComEd argues that the Commission may

[131] Complaint ¶ 12 (citing 47 U.S.C. § 224(c)(1)).

[132] Complaint ¶¶ 16- 18.

[133] Complaint ¶¶ 17-20.

not impose "retroactive rates" and that the Pole Attachment Act does not allow for "retroactive application of rules."[134] Yet, the Commission has not promulgated new rules and attempted to apply them retroactively to a prior case. The reality is that because there were never ICC rules applicable to telecommunications attachments, the Commission's rules *have always applied* to ComEd's behavior and this case because the ICC never had authority to regulate telecommunications attachments.

Even assuming, *arguendo*, that ComEd's belief that ICC was the appropriate regulator in this instance is in fact reasonable, ComEd had notice that its practices (requiring new attachers to pay for access to red tag poles and unreasonable delay) were denials of access and unjust and unreasonable terms and conditions of attachment. If ComEd assumed the ICC had jurisdiction, as ComEd claims, then at a minimum the FCC's long-established precedent sets forth powerful, persuasive authority regarding what constitutes unlawful denials of access and "just and reasonable" rates, terms, and conditions. The Commission's precedent was well-known and commonly followed even by "certified" states.[135]

Notably undermining ComEd's argument that it was not on notice of the Commission's rules, ComEd's parent company, Exelon, is a multi-state entity, and ComEd's affiliates operate in other states regulated by the FCC. Exelon filed a petition for reconsideration of the FCC's *One-Touch Make-Ready* ("*OTMR*") *Order*[136]—specifically addressing as objectionable the

[134] Answer pp. 18-19 (Aff. Def. ¶¶ 43-44).

[135] *See, e.g., Central Ill. Pub. Svc. Co. v. Illinois Commerce Comm'n*, 644 N.E.2d 817 (Ill. Ct. App. 1994) (affirming ICC's following of FCC precedent).

[136] *See In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd. 7705 (rel. Aug. 3, 2018) ("*OTMR Order*").

FCC's proposals on the red tag issue[137]—and in that petition, Exelon listed ComEd as an operating subsidiary.[138] ComEd cannot now claim that it was blindsided by the Commission's rules and precedent when it is actively seeking reconsideration of the red tag issue.

Moreover, the Crown Castle Pole Attachment Agreement incorporated the FCC pole rental rate formula.[139] This further evidence that the parties viewed the Commission's rules and decisions as informing Crown Castle's attachment to ComEd poles.

9. The Applicable Statute of Limitations For This Proceeding Is Ten Years

State statutes of limitations for actions on written contracts or written leases apply to pole attachment proceedings. Pursuant to 47 C.F.R. § 1.1407(a)(3), the Commission may order a refund "consistent with the applicable statute of limitations." Because the poles and attachments in question are located in the Chicago area, Illinois state law statutes of limitation apply to this proceeding.

The disputes in this proceeding stem from a contractual relationship between Crown Castle and ComEd. Therefore, the applicable statute of limitations is 735 ILCS 5/13-206, which provides that actions on written contracts and written leases must be brought within 10 years

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[137] Petition for Reconsideration of the Coalition of Concerned Utilities, WC Docket No. 17-84, WT Docket No. 17-79, at 13-14 (filed Oct. 15, 2018) ("[A] rule requiring red-tagged poles to be replaced immediately is a rule requiring utilities to expand capacity . . . . [T]he *Coalition* respectfully requests the Commission to reconsider and reject this ruling requiring premature pole replacement."). A copy of the Petition for Reconsideration is attached hereto as Attachment I.

[138] Exelon Petition for Recon at 3 & n.6 ("Exelon's operating companies are Atlantic City Electric, Baltimore Gas and Electric, ***ComEd***, Delmarva Power and Light, PECO, and Pepco.") (emphasis added).

[139] Complaint Attachment A, Hussey Decl. Ex. 1, Crown Castle Pole Attachment Agreement § 11.1.1, CCF000018.

after the cause of action accrues.[140] Indeed, as ComEd notes in its Answer,[141] other parties to FCC pole attachment complaint proceedings have recognized that a state contract statutes of limitations are the "applicable statute of limitations."[142]

ComEd contends that Section 415(b) of the Communications Act, which sets a two-year limitations period, is "the most analogous provision because it governs private complaints against carriers."[143] ComEd also asserts that "[t]he most analogous provision of state law is a provision of the Illinois Public Utilities Act [220 ILCS 5/9-252], which provides for a two-year limitations period for cases in which a consumer alleges that any "public utility" has made an 'excessive charge.'"[144] It also contends that "this is not an action for breach of contract; it is an action contending that the rate is excessive or unjust and unreasonable."[145]

ComEd's argument is flawed for four reasons. First, as ComEd acknowledges, Section 415(b) of the Communications Act applies to complaints against "carriers." If the Commission intended to model 47 C.F.R. § 1.1407(b)(3) (former 47 C.F.R. § 1.14110) after Section 415(b) and limit refunds to two years, it would have expressly done so when it revised its refund rule in 2011.[146] When the Commission modified its refund rule, the Commission "reasoned that the

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[140] *See* 735 ILCS 5/13-206 ("**[A]ctions** on bonds, promissory notes, bills of exchange, written leases, written contracts . . . shall be commenced within 10 years next after the cause of action accrued.") (emphasis added).

[141] Answer p. 22 n.62.

[142] *See, e.g.*, *Verizon Virginia, LLC v. Virginia Elec. & Power Co.*, 32 FCC Rcd. 3750, 3764 (2017).

[143] Answer p. 22 (Aff. Def. ¶ 51).

[144] *Id.* p. 23 (Aff. Def. ¶ 51).

[145] *Id.*

[146] *Implementation of Section 224 of the Act; A Nat'l Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd. 5240, 5290, ¶¶ 110-12 (2011).

current rule fails to make injured attachers whole, and is inconsistent with the *way that claims for monetary recovery are generally treated under the law*."[147] Monetary recoveries under contracts are generally governed by statute of limitations for actions on written contract.

Second, as ComEd acknowledges in its Answer, 220 ILCS 5/9-252 applies when a *consumer* alleges an excessive charge made by a public utility. Again, like with Section 415, the pole attachment agreement does not govern a relationship between a consumer and a seller; it governs the relationship between a lessor and a lessee. 220 ILCS 5/9-252 would apply to a claim by Crown Castle when it is a consumer of electric service—not when it leases space on ComEd poles.

Third, 220 ILCS 5/9-252 applies to situations in which a public utility charges excessive amounts for "its product, commodity, or service."[148] Again, Crown Castle is not purchasing a "product, commodity, or service" from ComEd; it is leasing space on ComEd's poles.

Finally, 735 ILCS 5/13-206 applies to *any* "action" on written contracts or written leases.[149] ComEd cannot consistently assert both that (a) it matters whether Crown Castle is a party to one of the pole attachment agreements with ComEd (discussed *supra*) and that (b) the statute of limitations for contracts does not apply. Rather, ComEd's arguments make clear that this action is based in the pole attachment agreement relationship (and thus 735 ILCS 5/13-206 applies).

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[147] *Id.* ¶ 110.

[148] 220 ILCS 5/9-25.

[149] *Cambridge Grp. Techs., Ltd. v. Motorola, Inc.*, 2018 IL App (1st) 170175-U, ¶ 57, *appeal denied*, 111 N.E.3d 971 (Ill. 2018) ("Section 13 206 of the Illinois Code of Civil Procedure provides that *any* action based on a written contract "shall be commenced within 10 years next after the cause of action accrued.") (emphasis added).

Because the 10-year statute of limitations for actions on written contracts and written leases apply to this proceeding, the refunds sought by Crown Castle are appropriate and fall within the applicable statute of limitations.

10. ComEd And Crown Castle's Prior Meetings With The Illinois Commerce Commission Are Irrelevant To This Proceeding

To support its purported belief that the ICC regulated all pole attachments in the State of Illinois and its belief that Crown Castle had that same understanding, ComEd argues that both ComEd and Crown Castle had meetings with the ICC to discuss pole attachment matters.[150] Whether ComEd or Crown Castle has previously met with the ICC to discuss pole attachment issues is not relevant to this proceeding. What is relevant to this proceeding are the facts that (a) the ICC has never adopted any rules or regulations that govern attachments made by telecommunications companies to electric utility poles and (b) the ICC confirmed in writing to the FCC that it does not have jurisdiction over such attachments.[151] By meeting with the ICC, Crown Castle did not concede that the ICC had jurisdiction. If anything, it confirmed the ICC does not have jurisdiction.

VIII. INFORMATION DESIGNATION

The following individuals likely have information relevant to the proceeding:

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[150] Answer p. 17 (Aff. Def. ¶ 40).

[151] Complaint ¶¶ 15-19 and Attachment C, Letter from ICC Chairman Brien J. Sheahan dated October 25, 2018.

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IX. CONCLUSION

ComEd's Answer fails to rebut Crown Castle's claims in its Complaint. For the reasons set forth in Crown Castle's Complaint and the foregoing, the Commission should grant Crown Castle the full relief requested in the Complaint, with refunds updated to reflect the most recent amounts unlawfully charged and paid as of the date of the Commission's final decision.

Respectfully submitted,

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August 5, 2019

RULE 1.721(m) VERIFICATION

I have read Complainant's Reply to Respondent's Answer to Complainant's Pole Attachment Complaint filed by Crown Castle Fiber LLC on August 5, 2019 in the above-referenced proceeding. To the best of my knowledge, information, and belief formed after reasonable inquiry, the Reply is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. The Reply is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2019, I caused a copy of the foregoing Reply to be served on the following (service method indicated):

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